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27 UNITED STATES DISTRICT COURT

28 NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

19 LAUREN RIES and SERENA ALGOZER,
20 individuals on behalf of themselves and all
21 others similarly situated,

22 Plaintiffs,

23 v.

24 HORNELL BREWING COMPANY, INC.,
25 BEVERAGE MARKETING USA, INC., and
26 FEROLITO, VULTAGGIO & SONS, INC.

27 Defendants.

CASE NO. CV 10-01139 JF

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN REPLY
TO PLAINTIFFS' OPPOSITION TO
MOTION TO DISMISS COMPLAINT**

JUDGE: Hon. Jeremy Fogel
CTRM: 3
DATE: March 4, 2011
TIME: 9:00 a.m.

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFFS'
OPPOSITION TO MOTION TO DISMISS COMPLAINT

In opposing Defendants' motion to dismiss, Plaintiffs: (1) mischaracterize Defendants' arguments regarding the statutory grounds cited for express preemption and the claims that Defendants contend are expressly preempted; (2) fail to cite any law which permits Plaintiffs to sue for restitution under the California Consumer Legal Remedies Act ("CLRA") without first furnishing Defendants with the required pre-suit notice; and (3) ignore that the fraud claims do not identify: (a) the specific products Plaintiffs purchased; (b) the dates of Plaintiffs' purchases; (c) the store locations of each purchase; (d) the prices Plaintiffs paid; and (5) the advertisements and marketing items relied upon by Plaintiffs. Under Fed.R.Civ.P. 9, Plaintiffs cannot satisfy the obligation of pleading fraud with particularity by mere notice pleading. Requiring Plaintiffs to plead fraud with particularity is especially appropriate here given the outcome of other actions commenced against Defendants, based on virtually identical allegations, wherein other courts determined that no case or controversy existed.¹

I. PLAINTIFFS' CLAIMS THAT DEFENDANTS MISBRAND BEVERAGES BEARING A FRUIT IN THE NAME OR DEPICTED ON THE LABEL ARE EXPRESSLY PREEMPTED BY 21 U.S.C. §§341-1(a), 343-1(a)(2) AND 343-1(a)(3) BECAUSE PLAINTIFFS SEEK TO IMPOSE LABELING OBLIGATIONS THAT DIFFER FROM THOSE REQUIRED BY FEDERAL LAW.

In opposing the motion, Plaintiffs mischaracterize Defendants' preemption argument. First, Plaintiffs argue that the claims regarding "All Natural" labeling are not preempted. However, as was stated at page 12 in Defendants' motion brief, Defendants are not arguing that the claim that high fructose corn syrup ("HFCS") is artificial is preempted. Instead, Defendants contend that Plaintiffs' claims that Defendants misbrand their "Fruit Products" are expressly preempted.²

¹ Attached as Exhibits D and E to Defendants' Request for Judicial Notice are orders of dismissal entered in those two other virtually identical cases (*Hitt v. Arizona Beverage Co* and *Covington v. Arizona Beverage Co.*). Plaintiff has moved to strike these public records from receiving judicial notice and Defendants have addressed that motion to strike separately.

² With respect to Plaintiffs' claims of misbranding due to lack of prominence in the statement of ingredients, Defendants also seek dismissal of such claims based upon express preemption. Those misbranding claims pertain to all products including beverages labeled "All Natural" and that contain HFCS and citric acid. Plaintiffs' opposition does not address the preemptive scope

Plaintiffs erroneously argue that Defendants have not cited to any specific statute in support of express preemption and falsely contend that Defendants seek to apply that doctrine based upon “the breath [sic] of the federal labeling scheme.” That is a mischaracterization of Defendants’ argument. Defendants are relying upon the express preemption provisions under 21 U.S.C. § 343-1(a) as well as § 343-1(a)(2) and § 343-1(a)(3). At pages 2, 3, 9 through 11 and 13 in Defendants’ motion brief, Defendants cite to 21 U.S.C. § 343-1(a) as well as § 343-1(a)(2) and § 343-1(a)(3) as the statutory grounds for express preemption. Those statutes are referred to repeatedly and the pertinent provisions contained therein are recited verbatim at pages 9 and 10 of the motion brief. Nevertheless, Plaintiffs disingenuously argue that “Defendants do not argue that § 343-1(a) or any paragraph thereof preempt Plaintiffs’ claims.”³

Plaintiffs devote scant attention to the pivotal question of whether Plaintiffs’ claims that Defendants misbrand their “Fruit Products” is an action to impose labeling obligations that differ from those imposed under federal law. The gravamen of Plaintiffs’ claim on the labeling of Fruit Products is that the products are deceptively named or depicted on the label. Plaintiffs allege that Defendants, expressly or through depictions, deceptively refer to their products as containing a fruit juice but that such products contain either an insignificant amount of that juice or do not contain that juice at all. (Doc. No. 1, page 2; Id. at ¶ 43)

At page 6 of their opposition, Plaintiffs contend that the FDA does not regulate the use of specific fruit names of beverages. That is not the case. 21 U.S.C. § 343(i)(1) governs misbranding of the common and usual names of products and 21 U.S.C. § 343(i)(2) governs the common and usual names of products purporting to be a beverage containing fruit juice. Claims regarding misbranding under 21 U.S.C. § 343(i)(1) and 21 U.S.C. § 343(i)(2) fall within the express preemption provisions of 21 U.S.C. § 343-1(a), 21 U.S.C. § 343-1(a)(2) and § 343-1(a)(3).

of 21 USC § 343-1(a)(3) as that statute bears upon the claims of misbranding due to alleged lack of prominence in ingredient statements.

³ There is no basis to grant Plaintiffs’ request to file a surreply given the fact that 21 USC § 343-1(a) was in fact relied upon and cited to repeatedly by Defendants.

1 The FDA’s common or usual name regulation for beverages that contain fruit juice is
 2 located at 21 C.F.R. § 102.33. That regulation addresses the proper labeling of beverages and, as
 3 such, implements 21 U.S.C. § 343(i)(1), which provides that a beverage is misbranded unless its
 4 “label bears . . . the common or usual name of the food.” The regulation provides that, with
 5 respect to a “diluted multiple-juice beverage or blend of single-strength juices where one or
 6 more, but not all, of the juices are named on the label other than in the ingredient statement, *and*
 7 *where the named juice is not the predominant juice*, the common or usual name for the product
 8 shall . . . [i]ndicate that the named juice is present as a flavor or flavoring.” § 102.33(d)(1)
 9 (emphasis added).

10 Plaintiffs also argue that the FDA regulations do not address representations that a
 11 product contains a particular fruit that is not in fact contained therein. That is untrue. 21 C.F.R.
 12 § 101.30(d) regulates how a percentage juice declaration should be made when, *inter alia*, the
 13 labeling suggests a fruit juice is contained in the product but no such juice is in fact an
 14 ingredient.

15 Because Plaintiffs’ claims of misbranding would: (1) prohibit Defendants from using the
 16 names and depictions of fruits on its beverage labels unless those fruit juices were present in the
 17 beverage in “substantial” amounts; and (2) prohibit products from having a fruit in the name
 18 regardless of disclosure that no fruit juice was contained in the product, Plaintiffs’ claims
 19 conflict with the requirements set forth in 21 C.F.R. §§ 102.33 and 101.30(d) and are expressly
 20 preempted under 21 U.S.C. § 343-1(a)(2) and (3).

21 Even when a claim may seek to impose a labeling standards different from the federal
 22 law, the express preemption provisions of 21 U.S.C. § 343-1(a) can apply. In *Pom Wonderful v.*
 23 *Coca Cola*, 727 F. Supp. 2d 849 (C.D. Cal. 2010), the plaintiff sued Coke for alleged deceptive
 24 labeling of the defendant’s blueberry pomegranate beverage. In a prior decision in that case, the
 25 court granted, in part, a motion to dismiss on express preemption grounds. *Id.* at 859. In that
 26 order, the district court ruled that the plaintiff’s state law claims for false advertising and unfair
 27 competition were expressly preempted under 21 U.S.C. § 343-1 to the extent plaintiff sought to
 28

1 impose obligations “not identical to” sections of the FFDCA including implementing regulations.
 2 (See Appendix of Unpublished Authorities submitted herewith at Exhibit A.)

3 Plaintiffs here do not directly dispute that their claims that Defendants misbrand their
 4 Fruit Products and misbrand all products, due to an alleged lack of label prominence, are actions
 5 that will or may impose labeling obligations not identical to the requirements set by federal law.
 6 Such claims are expressly preempted by 21 U.S.C. § 343-1(a), 21 U.S.C. § 343-1(a)(2) and §
 7 343-1(a)(3).⁴

8 **II. PLAINTIFFS’ RESTITUTION CLAIM IS AN ACTION FOR**
 9 **DAMAGES UNDER THE CLRA AND THE DAMAGE CLAIM**
 10 **SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH PRE-**
 11 **SUIT NOTICE REQUIREMENTS.**

12 The issue presented is whether Plaintiffs’ complaint, which seeks restitution for acts
 13 alleged to be violative under the CLRA, constitutes a claim for damages. Plaintiffs do not
 14 dispute that they are seeking restitution under the CLRA and have offered no law stating that a
 15 claim for restitution is not a claim for damages.

16 Plaintiffs argue instead that they “have not claimed actual or putative damages in their
 17 operative complaint, but instead advise[d] defendants that they intend to amend their operative
 18 complaint to seek actual and putative damages pursuant to § 1782.” Plaintiffs are making the
 19 same argument made in *Laster v. Team Mobile USA, Inc.*, 2008 WL 5216255 (S.D. Cal. 2008)
 20 (“*Laster II*”) where the court rejected the contention that restitution is not damages under the
 21 CLRA. The court in *Laster II* found that the notice requirement pertained to claims for damages
 22 including the restitution claim and dismissed the CLRA damage claim with prejudice finding
 23 that the notice requirement applied to monetary damages regardless of whether such damages
 24 were calculated based upon unjust enrichment of defendant or the plaintiff’s loss. (*Id.* at *17.)

25 ⁴ Plaintiffs cite to *Williams v. Gerber*, 552 F.3d 934 (9th Cir. 2008) in opposing the motion to
 26 dismiss but their reliance on that case is misplaced. *Williams v. Gerber* concerned whether a
 27 *prima facie* claim existed under the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550
 28 U.S. 544 (2007). *Id.* at 938. The Ninth Circuit did not address the issue of whether the claims
 were expressly preempted by the FFDCA and ruled that the defendant was barred, on appeal,
 from raising that defense. *Id.* at 937.

1 Plaintiffs also contend that regardless of whether restitution constitutes damages and
 2 regardless of whether the complaint seeks such damages, they provided sufficient notice under
 3 the CLRA. In claiming notice was provided, Plaintiffs rely on six letters, all of which are
 4 virtually identical in content. The letters are dated March 12, 2010 and were received after the
 5 complaint was filed. (See Exhibits A through F attached to Plaintiffs' opposition brief).
 6 Notwithstanding the fact that these letters were received after the action was commenced,
 7 Plaintiffs argue that these letters provided sufficient notice to Defendants. If Plaintiffs'
 8 complaint is ruled to contain a claim for damages under the CLRA, the March 12 letters could
 9 not provide the required pre- suit notice.⁵

10 Plaintiffs cite to *Stickrath v. Globalstar, Inc.*, 527 F.Supp.2d 992 (N.D. Cal. 2007) to
 11 support their position that they complied with CLRA notice requirements. However, *Stickrath*
 12 supports Defendants' motion because, in that case, the plaintiff sued for an injunction under the
 13 CLRA and the court noted that in the complaint the plaintiff "explicitly disavowed any claim for
 14 damages under the CLRA." *Id.* at 1001. In so finding, the court ruled that the plaintiff had no
 15 duty to notify the defendant prior to filing an action. *Id.*

16 Here, Plaintiffs did not disavow damages in the CLRA section of the complaint.
 17 Plaintiffs allege that they suffered damages in the count of the complaint wherein they allege
 18 CLRA violations and seek restitution in the relief section. (Doc. No. 1, ¶ 136; *Id.* at ¶ XII, (E)).
 19 In the relief demanded section, Plaintiffs demand a judgment "to restore, by way of restitution . .
 20 . any money acquired by means of Defendants' . . . unfair, unlawful or fraudulent business acts
 21 and practices described herein." *Id.*, Section XII, ¶E. In the CLRA cause of action, Plaintiffs
 22 allege that Defendants engaged in unfair and deceptive acts or practices. *Id.*, ¶¶ 131-136. The
 23 claim for restitution is based upon alleged acts including conduct claimed to be violative of the
 24

25 ⁵ Plaintiffs do not address that these letters fail to contain any request to repair or correct the
 26 asserted defect. Plaintiffs cite to the letters but omit the reference to what they demand in the
 27 correspondence (reimbursement of monies paid). Putting aside the fact that these letters were
 28 received after the action was filed, the correspondence does not contain the required content
 under Cal. Civ. Code § 1782(a) because they do not demand a correction, repair, replacement or
 rectification.

1 CLRA. As a general rule, a plaintiff is the master of his or her complaint. *Hunter v. Philip*
 2 *Morris USA et al*, 582 F.3d 1039, 1042 (9th Cir. 2009) (citations and quotations omitted.)
 3 Plaintiffs have not disclaimed that their present action is one in which they seek restitution for
 4 the CLRA violations asserted. Absent furnishing pre-suit notice, a claim for monetary damages
 5 under the CLRA cannot be legally pursued.

6 Plaintiffs argue, alternatively, that in the event they are found to have violated the notice
 7 requirements, a dismissal of the CLRA damage should be ordered without prejudice. However,
 8 no reason has been offered to justify such extraordinary relief. This is not a case where the
 9 complaint merely alludes to damages or where any reasonable excuse exists explaining the
 10 failure to furnish notice. Plaintiffs steadfastly claim that they have furnished the required notice
 11 even though Defendants received the letters after the complaint was filed. The purpose of the
 12 notice requirement is to provide sufficient notice to allow for correction or replacement and to
 13 facilitate pre-complaint settlement. *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d
 14 30, 40-41 (1975). Plaintiffs have flouted that obligation by filing an action for CLRA damages
 15 before any notice was received.

16 To permit Plaintiffs to re-file the claim, so as to pursue an action for CLRA damages
 17 already pled, would conflict with the notice provisions under the CLRA which, according to
 18 *Outboard Marine Corp.*, are to be strictly adhered to under California law. *Id.*, 52 Cal. App. 3d
 19 at 40-41. Consistent with the holdings in *Cattie v. Walmart Stores*, 504 F. Supp. 2d 939, 950
 20 (S.D. Cal. 2007), *Laster v. T-Mobile USA Inc*, 407 F. Supp. 2d 1181, 1196 (S.D. Cal 2005)
 21 (“*Laster I*”) and *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003), the
 22 claims for damages under the CLRA, if dismissed, should be dismissed with prejudice.

23 **III. PLAINTIFFS’ FRAUD ALLEGATIONS DO NOT CONTAIN THE** 24 **REQUIRED PARTICULARITY MANDATED UNDER RULE 9(b).**

25 In opposing the Rule 9 aspect of the motion to dismiss, Plaintiffs mischaracterize
 26 Defendants’ arguments erroneously contending that “Defendants do not contend they cannot
 27 prepare an adequate answer to Plaintiffs’ class action complaint.” However, at page 14 of the
 28 motion brief, Defendants have made that exact contention arguing that “Plaintiffs’ fraud

1 allegations do not give Defendants fair notice so that Defendants can properly defend against
2 such claims.”

3 Plaintiffs’ complaint fails to set forth, with adequate particularity, allegations of fraud in
4 two material respects. First, with respect to the claims of deceptive labeling, Plaintiffs cite to
5 four (4) labels attached to the complaint. There are approximately 40 different flavors of
6 Arizona beverage products. Some of those products are labeled with a fruit in the name; some of
7 the products do not contain such labeling. Many of the products have had labels that contained
8 the phrase “All Natural” but some beverages do contain such a reference as alleged. Many of the
9 products contain HFCS; some do not have that ingredient. In order to obtain fair notice of the
10 scope of the fraud allegations, it is respectfully submitted that the Plaintiffs should identify all of
11 the labels of products claimed to be violative of California law. Also, in order for Defendants to
12 have fair notice of the fraud claims so as to properly defend against such claims, Plaintiffs’
13 individual claims of fraud should set forth, with more particularity, the dates of alleged purchase,
14 the prices at which the products were purchased, the identity of the products purchased and the
15 stores at which the purchases took place.

16 Second, with respect to the claims of fraud based upon acts of advertising, marketing and
17 promotion (*i.e.*, separate and apart from the labels), there is no allegation of any specific item of
18 advertising, marketing or promotion alleged to be fraudulent. Consistent with Fed.R.Civ.P. 9,
19 Plaintiffs should be required to identify, with particularity, the items of advertising, marketing
20 and promotion claimed to be fraudulent and violative of California law. With respect to the
21 Plaintiffs individually, Plaintiffs should identify the particular advertisement, marketing and/or
22 promotion relied upon and the date of the occurrence(s).

23 In asserting that their complaint sets forth, with sufficient particularity, allegations of
24 fraud, Plaintiffs cite to *Von Koenig v. Snapple Beverage Corp.*, 713 F.Supp.2d 1066 (E.D. Cal.
25 2010). In *Von Koenig*, the plaintiffs there made similar claims asserted here that the “All
26 Natural” labeling of Snapple’s products, bearing HFCS as an ingredient, violated California law.
27 Snapple moved to dismiss the fraud claims on the grounds that plaintiffs failed to plead fraud
28

1 with particularity as required under Fed.R.Civ.P. 9. The court denied the motion in part finding
 2 that the plaintiffs' claims for alleged deceptive labeling were pled with requisite particularity but
 3 granted the motion (with leave to amend) "to the extent plaintiffs seek to bring claims based
 4 upon other advertisements and marketing or based upon labels not submitted to the court." *Id.* at
 5 1078. Ultimately, the plaintiffs' claims in *Von Koenig*, with respect to advertisements and
 6 marketing, were dismissed for failure to plead with specificity after the plaintiffs' amendment
 7 failed to include the specific items of advertisement or promotion alleged to be fraudulent. *Von*
 8 *Koenig v. Snapple Beverage Corp.*, No. 2:09-cv-00606 FCD EFB, 2011 WL 43577, *3 (E.D.
 9 Cal. Jan. 6, 2011). Similarly, here, Defendants are seeking to have Plaintiffs specify the items of
 10 marketing, advertisement, promotion and the other labels alleged to be fraudulent.

11 Consistent with Fed.R.Civ.P. 9, Plaintiffs should plead their fraud claim with requisite
 12 particularity. This obligation is especially appropriate given the fact that in two virtually
 13 identical cases, *Hitt v. Arizona Beverage Co.* and *Covington v. Arizona Beverage Co.*, two
 14 federal courts found that the matters, after years of litigation, did not present a justiciable case or
 15 controversy. *Hitt v. Arizona Beverage Co., LLC*, No. 08-cv-809 WQH (POR), 2009 WL426119,
 16 *5 (S.D. Cal. Nov. 24, 2009); *Covington v. Arizona Beverage Co., et al.*, Case No. 08-21894-
 17 CIV-Seitz-O'Sullivan; RJN Ex. E.

18 CONCLUSION

19 For the foregoing reasons, Defendants respectfully request that their motion to dismiss
 20 Plaintiffs' complaint be granted.

21 DATED: February 18, 2011 SEDGWICK, DETERT, MORAN & ARNOLD LLP

22 By: /s/ Andrew J. King

23 Andrew J. King (Bar No. 253962)

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